

FILED

U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

EASTERN DISTRICT OF TEXAS FEB 16 2006

MARSHALL DIVISION BY DAVID J. MALAND, CLERK
DEPUTY *M. Melvin*

TIVO, INC

DOCKET NO. 2:04CV01

VS.

TEXARKANA, TEXAS

ECHOSTAR COMM, ET AL

JANUARY 31, 2006, 9:58 A.M.

SUMMARY JUDGMENT MOTIONS

BEFORE THE HONORABLE DAVID FOLSOM

UNITED STATES DISTRICT JUDGE.

APPEARANCES:

FOR PLAINTIFF:

MR. PERRY M. GOLDBERG
MR. MORGAN CHU
MS. CHRISTINE W S BYRD
MR. ANDREI IANCU
MR. ALEXANDER C D GIZA
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FOR DEFENDANT:

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YOUNG, PICKETT & LEE
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COURT REPORTER:

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PROCEEDINGS RECORDED BY MANUAL STENOGRAPHY, TRANSCRIPT

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PRODUCED BY NOTE READING.

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P R O C E E D I N G S

TEXARKANA, TEXAS

JANUARY 31, 2006

(OPEN COURT)

THE COURT: MRS. MARTIN, IF YOU WILL CALL THE OTHER
MATTER SCHEDULED FOR THE TEN O'CLOCK HOUR.

THE CLERK: THE COURT CALLS CIVIL ACTION NUMBER
2:04CV1, TIVO V. ECHOSTAR.

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN. WE
ARE HERE ON VARIOUS COMPETING MOTIONS FOR SUMMARY JUDGMENT IN
THE MORNING HOUR. I BELIEVE I HAVE GIVEN EACH SIDE ONE HOUR
TO PRESENT MOTIONS AND RESPONSES, THEN JUDGE CRAVEN WILL HAVE
AN AFTERNOON SESSION CONCERNING DEPOSITION OBJECTIONS AND
EXHIBIT OBJECTIONS.

MY SUGGESTION, TIVO HAS ONE OUTSTANDING MOTION FOR
PARTIAL SUMMARY JUDGMENT. I WOULD SUGGEST TIVO GO FORWARD
WITH THAT MOTION, AND THEN ECHOSTAR MAY GO FORWARD IN ANY
PARTICULAR MOTION OR ORDER THAT YOU DESIRE. IS THAT AGREEABLE
WITH THE PARTIES?

MR. CHU: YES, YOUR HONOR.

THE COURT: WHAT I WOULD LIKE TO DO IS HAVE MOTION,
RESPONSE, REPLY BEFORE WE MOVE TO THE NEXT MOTION. AND AT THE
END OF THE DAY, IT WOULD PROBABLY BE HELPFUL IF THE PARTIES
WOULD ORDER A COPY OF THE TRANSCRIPT FROM MRS. CRAWFORD. AND
THEN BEFORE YOU LEAVE, I WANT TO DISCUSS EVERYONE'S CALENDAR

1 FOR THE MONTH OF MARCH. SO DON'T LET ME FORGET THAT. OR IF
2 YOU LIKE, WE CAN DISCUSS THAT NOW. WHAT IS EVERYONE'S
3 CALENDAR LOOKING LIKE FOR MARCH? WHAT SAYS THE PLAINTIFF?

4 MR. CHU: MORGAN CHU ON BEHALF OF PLAINTIFF TIVO,
5 YOUR HONOR. AS I THINK I INDICATED AT THE LAST HEARING, I
6 HAVE ANOTHER COURT THAT HAD SET A TRIAL FOR FEBRUARY 28TH. MY
7 EXPECTATION IS THAT IT WILL PROBABLY BE DONE, ASSUMING IT GOES
8 FORWARD, IN ABOUT TWO WEEKS. LOOKING AT THE CALENDAR AND
9 ALLOWING SOME ALLOWANCE, I THINK THAT IF WE WERE TO SET THE
10 CASE MARCH 20TH OR LATER. AT THE PRIOR HEARING, YOUR HONOR
11 SAID THAT YOU WERE AT LEAST TENTATIVELY CONSIDERING SETTING
12 THE CASE EITHER FOR MARCH 14TH OR MARCH 27TH. SO IF IT IS
13 BETWEEN THOSE TWO DATES, WE HAD INDICATED --

14 THE COURT: THE ONLY PROBLEM WITH IF WE START IT
15 MARCH THE 27TH, I HAVE THE COURTROOM FOR ESSENTIALLY THE MONTH
16 OF, THE BIG COURTROOM, THE MONTH OF MARCH. IF WE START IT THE
17 27TH, THEN OBVIOUSLY WE ARE GOING TO RUN INTO APRIL ON THIS
18 CASE. BUT I ALSO HAVE A CASE, SKY TECHNOLOGY V. IBM, THAT I
19 ALSO WANT TO TRY TO SET. SO I WILL DO MY LEVEL BEST TO WORK
20 AROUND EVERYONE'S SCHEDULE. WHEN WILL YOU KNOW MORE ABOUT
21 YOUR FEBRUARY 28TH SETTING?

22 MR. CHU: THERE ISN'T A DATE CERTAIN.

23 THE COURT: WHEN WAS THAT CASE SET, DO YOU KNOW?

24 MR. CHU: I THINK THE CURRENT DATE WAS SET SOMETIME
25 IN THE FALL OF 2005. IT MIGHT HAVE BEEN LATE FALL.

1 THE COURT: BEFORE OR AFTER THIS ONE WAS SET, DO YOU
2 KNOW?

3 MR. CHU: EXCUSE ME?

4 THE COURT: BEFORE OR AFTER THIS CASE WAS SET, DO YOU
5 KNOW?

6 MR. CHU: I DON'T RECALL TO A CERTAINTY, YOUR HONOR.
7 I HAVE A BELIEF, BUT BECAUSE I AM UNCERTAIN I DON'T WANT TO
8 GUESS AT IT.

9 THE COURT: WHY DON'T YOU TRY TO LET US KNOW IN THAT
10 REGARD. WHERE IS THAT CASE SET?

11 MR. CHU: LOS ANGELES, YOUR HONOR.

12 THE COURT: FEDERAL OR STATE COURT?

13 MR. CHU: FEDERAL COURT.

14 THE COURT: BEFORE, WHO IS THE JUDGE?

15 MR. CHU: JUDGE RAFEEDIE, AND HAVING TRIED A CASE
16 BEFORE HIM BEFORE, I KNOW THAT HE WILL BE VERY SPEEDY IN TERMS
17 OF THE LENGTH OF TRIAL, ASSUMING IT DOES TAKE PLACE BECAUSE -

18 THE COURT: I AM JUST TRYING TO DETERMINE WHO HAS
19 PRIORITY ON YOUR CALENDAR.

20 MR. CHU: EXCUSE ME, YOUR HONOR?

21 THE COURT: I WAS JUST TRYING TO DETERMINE WHO MIGHT
22 HAVE PRIORITY ON YOUR CALENDAR, THIS COURT OR THE CALIFORNIA
23 COURT. SO THAT'S WHY I ASK WHEN YOUR CASE WAS SET.

24 MR. CHU: RIGHT. IF YOU ARE ASKING ABOUT MY
25 CALENDAR, IF I AM MAKING A DECISION, WHICH I DON'T ALWAYS HAVE

1 THAT OPPORTUNITY TO DO, THIS CASE DEFINITELY HAS PRIORITY. AS
2 YOUR HONOR KNOWS, WE WERE SET TO GO IN OCTOBER AND BECAUSE OF
3 THE CONFLICTS THAT WERE UNAVOIDABLE, NOW WE ARE SET TO GO IN
4 MARCH.

5 THE COURT: OKAY. WHAT SAYS ECHOSTAR?

6 MS. KREVANS: YOUR HONOR, ECHOSTAR IS AVAILABLE, MR.
7 MCELHINNY, MR. KRAMER AND I, ON EITHER SET OF THE TWO WEEK
8 DATES. WE ARE ALSO ASSUMING THAT JURY SELECTION IS STILL SET
9 FOR MARCH 7.

10 THE COURT: WELL, IT DEPENDS UPON IF I TRY THIS CASE
11 LATER IN MARCH, I MAY NOT SELECT THE JURY UNTIL THE DAY WE
12 START TRIAL, AND SELECT THE JURY AND HAVE OPENING STATEMENTS
13 AND START TESTIMONY THE NEXT DAY. SO, I HOPE TO KNOW MORE
14 ABOUT MY, THOSE SETTINGS, WITHIN THE NEXT WEEK OR SO, BECAUSE
15 I KNOW EVERYONE HAS ARRANGEMENTS TO MAKE CONCERNING EXPERTS.
16 AND I WOULD LIKE A REPORT ON YOUR CALIFORNIA CASE, IF YOU CAN
17 GIVE ME MORE INFORMATION BY THE CLOSE OF THE WEEK OR EARLY
18 NEXT WEEK.

19 MS. KREVANS: YOUR HONOR, THE ONE THING I WOULD SAY,
20 ALTHOUGH IT IS NOT EASY, THE LAWYERS CAN DEFINITELY HOLD THEIR
21 CALENDARS. WE DO HAVE A NUMBER OF WITNESSES -

22 THE COURT: I UNDERSTAND.

23 MS. KREVANS: -- WHO ARE HAVING PROBLEMS WITH TRYING
24 TO HOLD FIVE WEEKS, AND THE SOONER WE KNOW THE BETTER.

25 THE COURT: I UNDERSTAND. I AM GOING TO TRY TO LET

1 BOTH THE LAWYERS KNOW IN THIS CASE AND THE IBM CASE SOON. MY
2 PLANS RIGHT NOW ARE SET THEM BOTH AND TRY THEM BOTH. SO, IT
3 IS GOING TO BE A LOVELY MARCH.

4 WITH THOSE COMMENTS, LET'S GO FORWARD WITH THE MOTION FOR
5 SUMMARY JUDGMENT.

6 MR. CHU: THANK YOU, YOUR HONOR.

7 THE COURT: WE WILL PROBABLY TRY TO TAKE A RECESS IN
8 APPROXIMATELY AN HOUR, GIVE OR TAKE A FEW MINUTES.

9 MR. IANCU: GOOD MORNING, YOUR HONOR. MY NAME IS
10 ANDREI IANCU FROM IRELL & MANELLA. WITH ME TODAY, IN ADDITION
11 TO MR. CHU, IS PERRY GOLDBERG, ALEX GIZA, ALSO FROM IRELL &
12 MANELLA, AND GARRET CHAMBERS FROM MCKOOL SMITH. MATTHEW ZINN,
13 GENERAL COUNSEL OF TIVO, IS ALSO IN THE AUDIENCE.

14 BEFORE WE BEGIN, I WOULD LIKE TO HAND OUT OUR BOOKLET OF
15 SLIDES. MAY I APPROACH?

16 THE COURT: YES.

17 MR. IANCU: I WILL NOT BE USING ALL THE SLIDES. I
18 WILL BE REFERRING TO THEM, TO JUST A FEW OF THEM AS I GO
19 ALONG. IN THE INTEREST OF TIME, WE WILL TOUCH ONLY ON SOME OF
20 THE ISSUES PRESENTED IN OUR PAPERS.

21 BEFORE WE -- SO I AM GOING TO ADDRESS FIRST TIVO'S MOTION
22 FOR SUMMARY JUDGMENT REGARDING CLAIMS 1 AND 32. AND BEFORE I
23 BEGIN, I WANT TO PROVIDE THE COURT WITH A BRIEF AND QUICK
24 REVIEW OF THE PATENTED TECHNOLOGY. AS WE MENTIONED BEFORE
25 WHEN WE WERE HERE FOR THE MARKMAN HEARING, THIS CASE AND THE

1 PATENTED TECHNOLOGY DEALS WITH AN IMPROVED ECONOMICAL AND
2 EFFICIENT WAY TO ACHIEVE DIGITAL VIDEO RECORDING TECHNOLOGY,
3 OR WHAT IS KNOWN AS DVRS. THE IDEA IS TO RECORD LIVE
4 TELEVISION AND SIMULTANEOUSLY BE ABLE TO PLAY IT BACK.

5 LET'S USE FIGURE 1 FROM THE PATENT AS A TALKING EXAMPLE,
6 AND LOOK INSIDE AN EXAMPLE OF WHAT MIGHT BE A DIGITAL VIDEO
7 RECORDER PURSUANT TO TIVO'S PATENT. THERE ARE WHAT WE HAVE
8 TALKED ABOUT AS TWO INDEPENDENT PROCESSES, ONE FOR RECORDING
9 LIVE TELEVISION, AND THE SECOND FOR PLAYING BACK LIVE
10 TELEVISION. THESE TWO PROCESSES ARE INDEPENDENT OF EACH
11 OTHER, THOUGH OBVIOUSLY INTERCONNECTED AND INTERRELATED.

12 STEPPING THROUGH THE FIGURE, JUST AS AN EXAMPLE, TO GET
13 OUR BEARINGS IN TERMS OF WHAT THE PATENT IS ABOUT, WE ARE
14 LOOKING INSIDE OF THE DIGITAL VIDEO RECORDER. THIS IS, AS AN
15 EXAMPLE, FIGURE 1 FROM THE PATENT. WE START WITH INPUT
16 TELEVISION STREAMS.

17 TELEVISION COMES TO OUR HOMES IN A VARIETY OF WAYS. YOU
18 KNOW, IT COULD BE AN ANTENNA ON OUR HOUSE OR RABBIT EARS. IN
19 THIS PARTICULAR CASE, WE HAVE SATELLITE TRANSMISSION FROM A
20 SATELLITE UP IN SPACE. THE WAVES TRAVEL THROUGH THE AIR IN AN
21 ANALOG FORMAT. THEY REACH THE DVR THAT IS CONNECTED TO OUR
22 TV. THESE ARE THE INPUT STREAMS.

23 FIRST, THE INPUT MODULE INSIDE THE DVR TAKES THE INPUT
24 STREAMS, WHICH ARE IN AN ANALOG FORMAT, AND CONVERTS THEM INTO
25 A STANDARDIZED DIGITAL FORMAT SO THAT THE COMPUTER INSIDE OF

1 THE DVR CAN PROCESS IT AND CAN PROCESS THE SIGNALS.

2 THE OUTPUT OF THE INPUT MODULE IS -- ARE WHAT'S CALLED
3 MPEG STREAMS. THESE ARE DIGITAL STREAMS STANDARDIZED. THE
4 WORD MPEG, OR THE INITIALS M-P-E-G, SIMPLY STAND FOR A
5 STANDARD FOR DIGITAL VIDEO PROCESSING.

6 THE STANDARDIZED SIGNALS THEN GO TO WHAT IS CALLED IN THE
7 PATENT A MEDIA SWITCH, WHICH ANALYZES AND INTELLIGENTLY
8 PROCESSES THE DATA. THEN THE DATA IS STORED ON THE HARD
9 DRIVE. THIS IS ON THE INPUT SIDE OF THE PROCESS. NOW, YOU
10 HAVE A PROGRAM THAT YOU DIDN'T WATCH -- I'M SORRY. NOW YOU
11 HAVE A PROGRAM THAT YOU WANTED TO STORE, YOU HAVE IT STORED ON
12 THE HARD DISK.

13 ON THE OUTPUT SIDE, WHEN YOU WANT TO WATCH WHAT YOU HAVE
14 STORED, THE DATA COMES OUT OF THE HARD DISK -- I'M SORRY. THE
15 DATA COMES OUT OF THE HARD DISK. IT GETS REASSEMBLED AS A
16 STREAM OF DIGITAL DATA. IT GOES THROUGH AN OUTPUT MODULE AND
17 CONVERTED BACK TO ANALOG SIGNALS FOR OUR TV TO DISPLAY THEM
18 AND WE CAN WATCH THEM.

19 ALL RIGHT, SO LET'S TURN NOW TO THE CLAIM, CLAIM 1 AS AN
20 EXAMPLE. WE ALSO HAVE A BOARD BENEATH THE SCREEN. I AM NOT
21 SURE THAT IT IS VISIBLE FROM THAT DISTANCE. IN ANY EVENT,
22 THERE ARE TERMS THAT THE PARTIES ARE DISPUTING IN
23 HIGHLIGHTING. I WILL NOT ADDRESS ALL OF THEM. I WILL FOCUS,
24 IN THE INTEREST OF TIME, ON WHAT SEEMS TO BE THE CORE DISPUTE
25 BETWEEN THE PARTIES.

1 AND LET'S START WITH ELEMENT 1D WHICH DEALS WITH THE
2 CONVERSION. WE GO BACK AND LOOK AT THE FIGURE. THIS HAPPENS
3 IN THE INPUT MODULE UP IN THE UPPER LEFT WHERE THE DIGITAL,
4 I'M SORRY, THE ANALOG DATA FROM THE SATELLITE GETS CONVERTED
5 INTO WHAT IS CALLED MPEG STREAMS, A STANDARDIZED FORMAT.

6 THE COURT HAS CONSTRUED THIS TERM, OR THIS ELEMENT 1D,
7 AND WE SHOW ON THE SCREEN THE COURT'S CONSTRUCTION. THE KEY
8 TO ELEMENT 1D, AND I AM GOING TO WALK OVER TO THE BOARD HERE,
9 IS THAT WHAT IS GETTING CONVERTED ARE ANALOG STREAM, I'M
10 SORRY, ANALOG DATA FROM THE SATELLITE INTO DIGITAL STREAMS.
11 THEY ARE CONVERTED INTO MPEG FORMATTED STREAMS FOR INTERNAL
12 TRANSFER AND MANIPULATION.

13 THE COURT: IT SEEMS ECHOSTAR'S PRIMARY DEFENSE TO
14 THIS MOTION IS THAT THE CONVERSION IN THE ECHOSTAR TECHNOLOGY
15 TAKES PLACE AT WHAT THEY CALL UP LINK CENTERS. DO YOU AGREE
16 WITH THAT? IN OTHER WORDS, THE MPEG CONVERSION DOESN'T TAKE
17 PLACE IN THE ECHOSTAR ACCUSED PRODUCT.

18 MR. IANCU. RIGHT. THIS IS ONE OF THEIR KEY
19 DEFENSES TO THIS MOTION, NO QUESTION ABOUT THAT. AND I WILL
20 ADDRESS THAT RIGHT NOW.

21 WHAT THEY ARE SAYING IS THAT THE SATELLITE TRANSMITS
22 ALREADY FORMATTED MPEG STREAMS, BUT THAT IS SIMPLY NOT THE
23 FACT. WHAT COMES THROUGH THE AIR WAVES ARE ANALOG SIGNALS.
24 ANALOG, AND THIS IS NOT A MATTER IN DISPUTE, ECHOSTAR ADMITS
25 THAT WHAT TRAVELS THROUGH THE AIR SPACE ARE ANALOG WAVES. YOU

1 CANNOT HAVE DIGITAL WAVES TRAVELING THROUGH OUR AIR. IT IS
2 JUST ZEROS AND ONES.

3 TO HAVE AN MPEG FORMATTED STREAM, YOU MUST CONVERT IT
4 FROM ANALOG TO DIGITAL. IN FACT, THE STANDARD SPECIFICATION
5 FOR MPEG STATES, DEFINES THE WORD STREAM, WHICH APPEARS IN THE
6 CLAIM. AND IT STATES THAT THE STREAM IS, QUOTE, "AN ORDERED
7 SERIES OF BITS THAT FORM THE CODED REPRESENTATION OF THE
8 DATA," CLOSE QUOTE. THAT IS FROM THE MPEG 2 VIDEO STANDARD.

9 WHEN IT TALKS ABOUT BITS, BITS IS SHORT FOR BINARY DIGITS
10 OR DIGITAL DATA. SO THE CLAIM REQUIRES CONVERSION INTO AN
11 MPEG STREAM DIGITAL DATA. AND ECHOSTAR DOES THAT. IT DOES
12 CONVERT IN THE DVR FROM ANALOG INTO DIGITAL.

13 NOW, WE CAN SEE THE CONVERSION TAKING PLACE IN ECHOSTAR'S
14 SYSTEM. THIS IS NOT THE MATTER IN DISPUTE. THERE IS ANALOG
15 TO DIGITAL CONVERSION. THERE ARE A NUMBER OF OTHER
16 CONVERSIONS AS WELL, SUCH AS DEMODULATION, FORWARD ERROR
17 CORRECTION, AND DESCRAMBLING AND RESCRAMBLING.

18 THE POINT, HOWEVER, IS THAT ECHOSTAR ADMITS THAT IT
19 CONVERTS THE DATA FROM ANALOG TO DIGITAL. THIS IS NOT THE
20 POINT IN DISPUTE. IT IS NOT A QUESTION OF FACT.

21 THE COURT: HOW DO THEY ADMIT THAT? IN WHAT METHOD,
22 BY TESTIMONY OR REQUEST FOR ADMISSIONS?

23 MR. IANCU: THERE IS TESTIMONY FROM THEIR EXPERT, AND
24 IN THEIR BRIEF ECHOSTAR STATES THAT ECHOSTAR ADMITS, I'M
25 SORRY, THAT ECHOSTAR CONVERTS FROM ANALOG TO DIGITAL. THERE

1 IS NO QUESTION THAT THEY CONVERT FROM ANALOG TO DIGITAL.
2 THEIR ONLY POINT OF DISPUTE IS THAT THAT'S NOT THE CONVERSION
3 INTO DIGITAL, INTO AN MPEG STREAM. SO THEY ARE ADMITTING THAT
4 THEY HAVE ANALOG TO DIGITAL CONVERSION BY THEIR DISPUTING
5 WHETHER THAT IS A CONVERSION INTO AN MPEG STREAM BECAUSE, THEY
6 ARGUE, IT IS ALREADY FORMATTED AS AN MPEG STREAM. BUT THAT IS
7 NOT THE CASE. SIGNALS TRAVEL FROM THE SATELLITE IN AN ANALOG
8 FORMAT. THAT IS NOT AN MPEG STREAM. TO BE AN MPEG STREAM, IT
9 MUST GO THROUGH ANALOG TO DIGITAL CONVERSION.

10 AND WITH THAT, I AM GOING TO MOVE ON TO A DIFFERENT CLAIM
11 ELEMENT, UNLESS THE COURT HAS FURTHER QUESTIONS.

12 THE COURT: NO, YOU MAY GO FORWARD. I'M SORRY.

13 MR. IANCU: THE SECOND POINT OF DISPUTE BETWEEN THE
14 PARTIES, OF MAJOR DISPUTE THAT SEEMS TO FORM THE CRUX OF
15 ECHOSTAR'S DEFENSE TO THIS MOTION, IS ELEMENT 1E, WHICH
16 PROVIDES A MEDIA SWITCH WHERE THE MEDIA SWITCH, I'M SORRY,
17 ANALYZES THE MPEG STREAM AND SEPARATES IT INTO VIDEO AND AUDIO
18 COMPONENTS.

19 LET'S TAKE A QUICK LOOK BACK AT THE FIGURE AND SEE WHERE
20 THIS IS HAPPENING. THIS IS THE MEDIA SWITCH THAT APPEARS IN
21 THE MIDDLE OF THE FIGURES. THIS IS SLIDE 4. THE DATA COMES
22 IN FROM THE INPUT MODULE. IT HAS BEEN CONVERTED TO THE
23 STANDARDIZED MPEG STREAM DIGITAL DATA. THEN THE MEDIA SWITCH
24 BEFORE IT STORES IT ONTO THE HARD DISK, IT PROCESSES IT AND IT
25 ANALYZES IT, AND IT, AS THE CLAIM SAYS, SEPARATES IT INTO

1 AUDIO AND VIDEO COMPONENTS, OR DISTINGUISHES THE COMPONENTS
2 FROM EACH OTHER. DOES ECHOSTAR DO THAT? WELL, ECHOSTAR, OF
3 COURSE, HAS A MEDIA SWITCH. IT HAS A COMPUTER CHIP THAT HAS
4 WHAT WE KNOW AS A MEDIA SWITCH. IT HAS A CPU. IT MEDIATES
5 BETWEEN THE HARD DISK MEMORY AND THE CPU.

6 LET'S FOCUS, THOUGH, ON THE WORD SEPARATE AND ANALYZE, OR
7 PARSE, AS THE COURT HAS CONSTRUED THAT TERM. WHAT REALLY DOES
8 THE PATENT TALK ABOUT? WHEN THE PATENT TALKS ABOUT THE
9 PARSER, OR THIS COMPONENT WITHIN THE MEDIA SWITCH, IT TALKS
10 ABOUT SOMETHING THAT ANALYZES THE DATA THAT HAS BEEN CONVERTED
11 INTO DIGITAL DATA. IT LOOKS FOR IMPORTANT EVENTS. IT
12 IDENTIFIES VIDEO AND AUDIO SEGMENTS, AND IT CREATES WHAT IS
13 KNOWN AS A FRAME INDEX, OR AN EVENT CUE. IT LOOKS FOR AUDIO
14 AND VIDEO DATA, TRIES TO FIGURE OUT WHICH IS WHICH, WHERE IT
15 HAS OCCURRED, AND KEEPS TRACK OF IT.

16 AN MPEG STREAM, GOING BACK TO THE STANDARDIZED DIGITAL
17 STREAM, IS A STREAM OF VIDEO AND AUDIO COMPONENTS. BY
18 DEFINITION, THEY HAVE BEEN SEPARATED. THEY HAVE BEEN AS PART
19 OF THE CONVERSION PROCESS TURNED INTO VIDEO, SEPARATE VIDEO
20 AND AUDIO COMPONENTS. ECHOSTAR USES MPEG, AND THERE IS NO
21 QUESTION THAT THEY HAVE STREAMS WITH COMPONENTS THAT ARE
22 SEPARATED IN THIS MANNER.

23 WHAT IS NEEDED FOR THE DVR, THOUGH, TO BE AN INTELLIGENT
24 SYSTEM AND PROCESS THE DATA EFFICIENTLY IS TO IDENTIFY AND TO
25 DISTINGUISH THE VIDEO AND THE AUDIO SEGMENTS OR COMPONENTS TO

1 KEEP TRACK OF THEM. THIS IS WHAT IS KNOWN AS THE SEPARATION
2 OF THE COMPONENTS. IT IS A DISTINGUISHMENT OF THE COMPONENTS.
3 WHEN WE TALK ABOUT THE WORD SEPARATE, WE THINK ABOUT
4 DISTINGUISHING.

5 WHEN WE WERE HERE LAST TIME, YOUR HONOR, WE SPOKE ABOUT A
6 LAW SCHOOL CLASS EXAMPLE, AND WE SAID WE DON'T KNOW IF
7 EVERYBODY AGREES WITH THIS, BUT ONE CAN CONTEMPLATE LAW SCHOOL
8 GRADES ON AN EXAM, PERHAPS SEPARATING THE STUDENTS THAT HAVE
9 MASTERED THE MATERIAL FROM THE STUDENTS THAT HAVE NOT MASTERED
10 THE MATERIAL. NOT EVERYBODY AGREES WITH THIS ANALYSIS OF LAW
11 SCHOOL, OF COURSE, BUT IN ANY EVENT, IT IS A LOGICAL
12 IDENTIFICATION OF STUDENTS WHO HAVE, FOR EXAMPLE, A'S, VERSUS
13 STUDENTS WHO HAVE B'S. NO PHYSICAL SEPARATION IS NECESSARY.
14 YOU DON'T NEED TO SEND THE A'S TO ONE ROOM AND THE B'S TO A
15 SEPARATE ROOM. AS LONG AS YOU HAVE TABBED THEM AND KEEPING
16 TRACK OF THEM, YOU KNOW WHICH IS WHICH.

17 NOW, WHY IS IT NECESSARY TO IDENTIFY AND DISTINGUISH THE
18 VIDEO AND AUDIO COMPONENTS? LET'S LOOK AT THE DVR SYSTEM
19 AGAIN IN ITS ENTIRETY. DATA COMES IN, AS I SAID, BROADCASTS
20 TV SIGNALS IN AN ANALOG FORMAT. THE INPUT SECTION THEN
21 CONVERTS THEM INTO DIGITAL STANDARDIZED FORMATS. IT GETS NOW
22 TO THE MEDIA SWITCH, THE COMPONENT WE ARE TALKING ABOUT. WHAT
23 DOES THE MEDIA SWITCH DO? IT ANALYZES THEM AND THEN IT
24 SEPARATES THEM. IT CREATES THIS TABLE OF VIDEO AND AUDIO
25 COMPONENTS WHERE THEY HAVE OCCURRED, WHERE THEY ARE IN MEMORY,

1 AND HOW TO KEEP TRACK OF THEM.

2 THIS IS NECESSARY SO THAT WHEN YOU COME BACK HOME, FOR
3 EXAMPLE, AND YOU WANT TO WATCH THE TV PROGRAM THAT YOU HAVE
4 STORED, YOU CAN QUICKLY FIND IT AND TAKE IT OUT OF THE HARD
5 DRIVE AND OUTPUT IT TO YOUR TV.

6 NOW, DOES ECHOSTAR HAVE SUCH A SYSTEM? INDEED IT DOES.
7 ECHOSTAR HAS WHAT IS LABELED IN THEIR DOCUMENTS AS A START
8 CODE DETECTOR. THE START CODE DETECTOR HAS THE DIGITAL DATA
9 GOING THROUGH IT, AND IT ANALYZES IT AND THEN IT SEPARATES IT
10 JUST AS THE PATENT DESCRIBES. AS YOU CAN SEE ON THE SLIDE,
11 THE DATA GOES THROUGH, AND WHEN IT ENCOUNTERS A VIDEO FRAME,
12 IT KEEPS TRACK OF WHERE THE VIDEO FRAME HAS OCCURRED AND WHERE
13 IN MEMORY IT HAS PLACED IT. THIS WAY THE VIDEO DATA, IT IS
14 SEPARATED. IT IS SEPARATED FROM THE AUDIO DATA.

15 DIFFERENT ECHOSTAR PRODUCTS OPERATE A LITTLE DIFFERENTLY.
16 IN OTHER ECHOSTAR PRODUCTS, THE DATA ACTUALLY GETS PHYSICALLY
17 SEPARATED INTO TWO STREAMS, A VIDEO STREAM AND AN AUDIO
18 STREAM. THIS ALSO, OF COURSE, INFRINGES THE PATENT. BUT THE
19 KEY POINT, AND ECHOSTAR ADMITS THAT THIS EMBODIMENT IN THEIR
20 PRODUCTS, THEY ARE CALLED THE ECHOSTAR DP-50X PRODUCTS, MEET
21 THIS CLAIM ELEMENT. THERE IS AN ADMISSION TO THAT EFFECT.
22 BUT THEY SAY THAT THIS IS THE ONLY PRODUCT THAT MEETS THIS
23 CLAIM ELEMENT, BECAUSE IN THIS PRODUCT THERE IS CLEAR PHYSICAL
24 SEPARATION BETWEEN THE VIDEO AND AUDIO STREAMS.

25 BUT THE CLAIMS DO NOT REQUIRE PHYSICAL SEPARATION, AND IN

1 ANY EVENT, THE CLAIMS DO NOT REQUIRE PHYSICAL SEPARATION INTO
2 TWO SEPARATE STREAMS. THE CLAIMS SIMPLY SAY THAT IT MUST
3 SEPARATE VIDEO AND AUDIO COMPONENTS. AND THE WORD COMPONENT
4 IS NOT THE SAME AS THE WORD STREAM. IN THE DP-50X THAT WE SEE
5 IN THIS FIGURE, CLEARLY TWO SEPARATE STREAMS HAVE BEEN
6 CREATED. IN THEIR OTHER, IN THE OTHER ECHOSTAR PRODUCTS, THE
7 COMPONENTS ARE SEPARATED, JUST LIKE THE CLAIM REQUIRES. AND A
8 TABLE OF THE VIDEO DATA IS EXTRACTED SEPARATE FROM THE AUDIO
9 DATA.

10 THESE ARE THE ONLY TWO ELEMENTS, YOUR HONOR, THAT I WANT
11 TO COVER, IN THE INTEREST OF TIME. UNLESS THE COURT HAS OTHER
12 QUESTIONS, THE REST OF THE ELEMENTS ARE BRIEFED IN OUR PAPERS.

13 THE COURT: NOT AT THIS TIME. RESPONSE.

14 MS. KREVANS: GOOD MORNING, YOUR HONOR. RACHEL
15 KREVANS FROM MORRISON FOR ECHOSTAR. ALSO WITH ME TODAY ARE
16 KARL KRAMER, DAMON YOUNG, JOHN PICKETT, AND OUR CLIENT, KERRY
17 MILLER, IS HERE AS WELL. WHY DON'T WE GO AHEAD AND GO TO A
18 COUPLE OF PAGES IN, KARL.

19 LET ME FIRST, BEFORE I GET INTO THE SPECIFICS OF OUR
20 PRESENTATION, ADDRESS A COUPLE OF THE OVERALL POINTS THAT MR.
21 IANCU JUST MADE. FIRST OF ALL, HE STARTED OUT WITH WHAT HE
22 CALLED A DESCRIPTION OF THE TECHNOLOGY OF THE '389 PATENT.
23 AND HE SAID IT WAS THIS IMPROVED DVR THAT HAD BETTER ECONOMY,
24 AND EFFICIENT PROCESSING, AND SOME OTHER THINGS.

25 WHAT HE DIDN'T MENTION IS THAT ONE OF THE FEATURES OF THE

1 '389 PATENT IS THAT IT IS A BOX THAT IS SUPPOSED TO BE ABLE TO
2 PROVIDE A UNIVERSAL DIGITAL VIDEO RECORDER TO A CUSTOMER SO
3 THAT NO MATTER WHAT KIND OF TV SYSTEM THE CUSTOMER HAS, THEY
4 CAN STILL RECORD DIGITALLY AND STORE IT ON A HARD DRIVE AND
5 PLAY IT BACK, INCLUDING, FOR EXAMPLE, WITH ALL OFF AIR
6 TELEVISION, WHICH IS AN ANALOG TELEVISION FORMAT. AND IN
7 ORDER TO DO THAT, IN ORDER TO BE A UNIVERSAL DVR, TO ACCEPT
8 ALL THESE DIFFERENT FORMATS, THE BOX HAS TO HAVE INSIDE IT AN
9 MPEG CONVERTOR.

10 WHY DOES IT HAVE TO HAVE THAT? BECAUSE YOU CAN'T STORE
11 ANALOG TELEVISION ON A HARD DRIVE AND EXPECT TO STORE MORE
12 THAN A HALF HOUR OR AN HOUR SHOW ON YOUR WHOLE BOX. IT'S TOO
13 BIG. YOU HAVE TO DIGITIZE AND COMPRESS THE INFORMATION.
14 THAT'S THE POINT OF THE MPEG CONVERSION. AND THIS BOX AND
15 THIS SYSTEM WAS DESIGNED SO THAT NO MATTER WHAT KIND OF TV YOU
16 GOT, YOU COULD, IF NECESSARY, WHICH WAS ONLY TRUE FOR ANALOG
17 FORMAT BROADCASTS, YOU COULD CONVERT IT TO MPEG, MEANING YOU
18 COMPRESS IT, AND NOW INSTEAD OF HAVING A HARD DRIVE THAT CAN
19 ONLY STORE AN HOUR OF TELEVISION, YOU HAVE GOT A HARD DRIVE
20 THAT CAN STORE TWENTY OR THIRTY OR FORTY, IN MODERN BOXES, A
21 HUNDRED HOURS. THAT IS A KEY ASPECT OF THIS INVENTION, IT IS
22 A KEY ASPECT OF THE DISCLOSURE, AND IT IS A KEY ASPECT OF
23 THESE CLAIMS. AND MR. IANCU WOULD LIKE YOU NOT TO THINK ABOUT
24 THAT BECAUSE, OF COURSE, ECHOSTAR BOXES DON'T DO THAT.

25 NOW, THE OTHER BIG PICTURE POINT THAT MR. IANCU STARTED

1 WITH WAS THIS NOTION OF ECHOSTAR'S BROADCAST BEING BROADCAST
2 IN ANALOG FORMAT. HE IS MIXING AND MATCHING TWO ASPECTS OF
3 TECHNOLOGY HERE, AND I HAVE GOT SOME SLIDES THAT ARE GOING TO
4 ILLUSTRATE THIS LATER ON, BUT I WANTED TO FLAG THIS POINT AT
5 THE BEGINNING, BECAUSE IT IS REALLY IMPORTANT.

6 WHEN MR. IANCU SAID ECHOSTAR BROADCASTS IN ANALOG FORMAT
7 AND THE BOXES RECEIVE ANALOG FORMAT, THAT IS JUST WRONG. WHAT
8 ECHOSTAR BROADCASTS IS DIGITAL FORMAT, AND SPECIFICALLY MPEG
9 FORMAT. IT IS CARRIED TO THE SATELLITE AND CARRIED DOWN FROM
10 A SATELLITE TO THE BOX ON AN ANALOG CARRIER WAVE, LIKE EVERY
11 OTHER KIND OF TELEVISION THAT IS BROADCAST.

12 THE COURT: WHY IS THAT IMPORTANT IN THE COURT'S
13 CONSIDERATION OF THESE VARIOUS MOTIONS?

14 MS. KREVANS: BECAUSE WHAT MR. IANCU WANTS THE COURT
15 TO DO IS TO TREAT THE PROCESS IN THE BOX OF RECOVERING THE
16 DIGITAL DATA FROM THE ANALOG CARRIER WAVE AS A CONVERSION OF
17 THAT ALREADY MPEG FORMATTED DATA INTO MPEG FORMAT, WHEN, IN
18 FACT, IT IS ALREADY IN MPEG FORMAT, AND NO ONE DISPUTES THAT,
19 INCLUDING TIVO'S OWN EXPERT. SO THIS NOTION OF ANALOG FORMAT,
20 THAT'S A MISNOMER. IT'S AN ANALOG CARRIER WAVE, THE SAME KIND
21 OF ANALOG CARRIER WAVE THAT CARRIES ANALOG FORMAT TELEVISION
22 TO YOUR HOUSE.

23 IF YOU WERE IN THE TV STUDIO THAT WAS BROADCASTING OLD
24 STYLE, JUST REGULAR OLD ANALOG TELEVISION, WHAT THEY CALL NTSC
25 IN THE U.S., YOU COULD, THAT BROADCAST COULD MAKE IT FROM ONE

1 ROOM OF THE STUDIO TO THE NEXT ONE, BUT IT COULDN'T MAKE IT TO
2 YOUR HOUSE TWENTY MILES AWAY BECAUSE THE SIGNAL IS JUST NOT
3 STRONG ENOUGH. THEY PUT IT ON AN ANALOG CARRIER WAVE TO
4 BROADCAST IT TO YOUR HOUSE, BUT IT IS ANALOG FORMAT
5 TELEVISION.

6 NOW, IF IT'S DIGITAL FORMAT TELEVISION, AND IF IT IS
7 SPECIFICALLY MPEG, THE SAME THING IS TRUE. TO GET IT FAR
8 AWAY, IN THIS CASE SPECIFICALLY TO A SATELLITE, IT IS
9 MODULATED ONTO AN ANALOG CARRIER WAVE. THAT IS NOT ANALOG
10 FORMAT TELEVISION, AND THE PATENT ACTUALLY SAYS SO, SO WE WILL
11 LOOK AT THAT.

12 SO I, ALSO IN THE INTEREST OF TIME, AM JUST GOING TO
13 ADDRESS A COUPLE OF KEY POINTS ABOUT THESE HARDWARE CLAIMS,
14 CLAIMS 1 AND 31. AND THE TWO POINTS I AM GOING TO ADDRESS ARE
15 THIS CONVERSION POINT, AND THEN THE SEPARATION AND ASSEMBLY
16 POINT. I THINK THEY ARE BOTH VERY IMPORTANT, ALTHOUGH WE HAVE
17 MANY OTHER ARGUMENTS, BUT THEY ALSO ARE THINGS WHERE I THINK
18 VISUALS ARE QUITE HELPFUL. SO, WE DON'T CONVERT, AS I SAID,
19 WE DON'T SEPARATE AND ASSEMBLE. WITH RESPECT --

20 THE COURT: WHAT IS AN UP LINK CENTER?

21 MS. KREVANS: UP LINK IS JUST WHAT IS REFERRED, WHAT
22 IS USED IN THE INDUSTRY TO REFER TO THE PROCESS OF SENDING THE
23 SIGNAL UP TO THE SATELLITE. THAT IS CALLED UP LINKING RATHER
24 THAN BROADCASTING, AND THEN COMING DOWN FROM THE SATELLITE IS
25 REFERRED TO AS BROADCASTING.

1 THE COURT: AND YOU ARE SAYING IT IS BROADCAST FROM
2 THE UP LINK CENTER TO THE SATELLITE IN MPEG FORMAT?

3 MS. KREVANS: RIGHT. THAT IS ABSOLUTELY THE CASE.

4 THE COURT: BUT BACK FROM THE SATELLITE IN ANALOG --
5 NO, DIGITAL?

6 MS. KREVANS: STILL MPEG, STILL MPEG FORMAT. IT IS
7 ON AN ANALOG CARRIER WAVE THE WHOLE TIME. SO THE ANALOG, THE
8 WAY IT WORKS IS THE MAIN UP LINK CENTER IS IN CHEYENNE,
9 WYOMING. ALL THE CONTENT IS GATHERED THERE FROM CONTENT
10 PROVIDERS. EVERY SPECIFIC PROGRAM SERVICE HAS A SET OF
11 PROCESSING, INCLUDING A BIG INDUSTRIAL SIZE MPEG CONVERTER.
12 THE PROGRAMMING IS DIGITIZED, IT'S COMPRESSED, THAT IS THE
13 MPEG CONVERSION, AND THEN IT GETS MODULATED ONTO, GETS
14 MULTIPLEXED, PUT TOGETHER WITH OTHER PROGRAMS BECAUSE YOU ARE
15 GOING TO SEND EIGHT OR NINE TOGETHER AT ONCE ON ONE SET OF
16 BAND WIDTH. THEN IT IS MODULATED ON TO THIS ANALOG CARRIER
17 WAVE AT VERY HIGH FREQUENCY, BECAUSE YOU NEED THAT TO GET UP
18 TO THE SATELLITE. AND THE TRANSIT UP THE SATELLITE IS JUST
19 CALLED UP LINKING RATHER THAN BROADCASTING. COMING DOWN IT IS
20 CALLED BROADCASTING. THE WHOLE THING YOU CAN THINK OF AS A
21 BROADCAST.

22 SO, LET'S GO ON AND TALK ABOUT CONVERSION. THE CLAIM, AS
23 MR. IANCU SAID, REQUIRES THAT THE SET UP BOX CONVERTS THE
24 SPECIFIC PROGRAM INTO AN MPEG FORMATTED STREAM FOR INTERNAL
25 TRANSFER MANIPULATION. NOW, THE PATENT DOESN'T SAY ANYTHING

1 TO SUGGEST THAT RECOVERING ALREADY MPEG FORMATTED DIGITAL DATA
2 OFF AN ANALOG CARRIER WAVE IS BAD CONVERSION. IN FACT, IT
3 TELLS YOU EXPLICITLY THAT IT ISN'T.

4 IN THE PATENT, AND THIS IS ALL AT THE TOP OF COLUMN 2,
5 THERE IS AN EXPRESS DISTINCTION BETWEEN CONVERTING A BROADCAST
6 SIGNAL TO MPEG FORMAT FROM EXTRACTING A PRE-EXISTING MPEG
7 FORMATTED DATA FROM A SATELLITE SIGNAL. AND THE CLAIMS, OF
8 COURSE, REQUIRE THE CONVERSION.

9 NOW, LET'S LOOK AT WHAT THE PATENT ACTUALLY SAYS. IT
10 DISTINGUISHES BETWEEN THESE TWO, THAT IS, AN INCOMING ANALOG
11 STREAM AND INCOMING DIGITAL STREAM. BOTH OF THESE COME INTO
12 THE RECEIVER ON AN ANALOG CARRIER WAVE. BUT THE NATURE OF THE
13 SIGNAL IS DIFFERENT. AND IF WE GO TO THE NEXT SLIDE WE CAN
14 SEE IN THE PATENT AT THE TOP OF COLUMN 2 WHERE IT EXPLICITLY
15 SHOWS YOU WHY MR. IANCU IS WRONG IN SAYING THE ISSUE HERE IS
16 THE CARRIER WAVE IS ANALOG.

17 IT TALKS ABOUT THE EMBODIMENT ACCEPTING TELEVISION IN
18 MULTITUDE OF FORMS. FOR EXAMPLE, ANALOG FORMS, SUCH AS NTSC
19 OR PAL, PAL IS JUST EUROPEAN ANALOG, AND DIGITAL FORMS SUCH AS
20 DSS, DBS, AND ATSC. NOW EVERYBODY AGREES ECHOSTAR USES A
21 DIGITAL FORM CALLED DVB. IT IS LIKE DSS, IN ESSENCE, LIKE DSS
22 AND DBS. IF WE CAN GO BACK TO THAT FOR A MOMENT.

23 YOU CAN SEE HERE WHEN THE PATENT TALKS ABOUT WHETHER
24 SOMETHING IS ANALOG OR DIGITAL, IT IS REFERRING TO THESE
25 DIGITAL SATELLITE BROADCASTS AS DIGITAL FORMS. NOW, THEY ARE

1 COMING IN ON AN ANALOG CARRIER WAVE, BUT IT CONSIDERS THEM
2 DIGITAL FORMS AND THEY ARE ALREADY MPEG. AND NOW IT IS GOING
3 TO TELL US WE DO DIFFERENT THINGS TO EACH OF THESE. ANALOG
4 FORMS ARE CONVERTED TO MPEG. THEY HAVE TO BE BECAUSE THEY
5 NEED TO BE COMPRESSED SO THEY CAN BE STORED. DIGITAL FORMS,
6 THESE ARE ALREADY PREFORMATTED MPEG STREAMS COMING IN ON THAT
7 CARRIER WAVE, AND THEY ARE EXTRACTED FROM THE SIGNAL AND
8 PASSED ON TO THE REST OF THE BOX. AND NOW BOTH FORMS LOOK THE
9 SAME. ONE ALREADY CAME IN COMPRESSED IN MPEG. THE OTHER ONE,
10 THE ANALOG, WE HAVE CONVERTED IN THIS PATENT.

11 BUT ECHOSTAR DOESN'T DO THAT BECAUSE WE ARE PREFORMATTED.
12 BUT NOTHING HERE TELLS YOU WHAT WE CONSIDER THE DIGITAL TO BE
13 ANALOG BECAUSE IT CAME IN ON A CARRIER WAVE. THIS PATENT
14 CONSIDERS THAT DIGITAL TO BE DIGITAL, BECAUSE THAT IS THE
15 NATURE OF THE TELEVISION INFORMATION THAT IS COMING IN. IF WE
16 COULD GO ON.

17 NOT ONLY DOES THE INTRODUCTION OF THE PATENT SAY THIS,
18 BUT IF YOU LOOK AT THE FIGURES YOU CAN SEE THE EXACT SAME
19 THING. THIS IS FIGURE 7, WHICH IS A BUNCH OF THE KEY HARDWARE
20 COMPONENTS INVOLVED. YOU SEE ON THE LEFT THERE IS AN MPEG
21 ENCODER. AND MY BOX THERE IS JUST SIMPLY THE TEXT THAT
22 DESCRIBES THIS FIGURE. WE PUT A RED BOX AROUND THE MPEG TO
23 HIGHLIGHT IT.

24 NOW, WHAT DOES THE PATENT ACTUALLY SAY ABOUT THIS? IT
25 SAYS: IF THE INPUT STREAM IS ALREADY IN MPEG FORMAT, AS THE

1 ECHOSTAR BROADCAST IS, THERE IS NO NEED FOR THE MPEG ENCODER.
2 IF THE DIGITAL TV SIGNAL IS BEING PROCESSED INSTEAD, THE MPEG
3 ENCODER IS REPLACED WITH A DEMULTIPLEXER. THAT IS A PIECE OF
4 HARDWARE THAT EXTRACTS FROM THE TRANSPORT MPEG STREAM THE
5 PARTICULAR PROGRAM AUDIO AND VIDEO THAT YOU WANT TO WATCH.

6 SO, WE KNOW IN THE WORDS OF THE PATENT THAT THE
7 CONVERSION THAT IS BEING TALKED ABOUT HERE IS A CONVERSION OF
8 ANALOG FORMATTED TELEVISION, NTSC FORMAT INTO MPEG. IT IS NOT
9 A CONVERSION THAT APPLIES TO PREFORMATTED MPEG STREAMS LIKE
10 ECHOSTAR'S. YES, THOSE STREAMS HAVE TO BE TAKEN BACK OFF THE
11 ANALOG CARRIER WAVE FOR FURTHER PROCESSING IN THE BOX, BUT THE
12 NATURE OF THE INFORMATION THE CARRIER WAVE WAS CARRYING,
13 DIGITAL MPEG.

14 AND, IN FACT, DR. GIBSON, TIVO'S EXPERT, HAS ADMITTED
15 THIS FACT THAT THE STREAM IS ALWAYS MPEG AS IT TRAVELS ON, AND
16 WE HAVE SUBMITTED THAT TO THE COURT, THAT TESTIMONY TO THE
17 COURT IN ONE OF OUR EXHIBITS TO THE SUMMARY JUDGMENT MOTION.
18 HE DOESN'T DISPUTE THAT IT IS CONVERTED TO MPEG IN CHEYENNE.
19 HE DOESN'T DISPUTE THAT AS IT IS TRAVELING THROUGH THE AIR IT
20 IS AN MPEG FORMATTED STREAM. WHAT HE SAYS, IF YOU HAD HIM
21 HERE TODAY, IS, AND I ASKED HIM ABOUT THIS IN HIS DEPOSITION,
22 IS HE SAYS THESE OTHER THINGS ARE ALSO CONVERSIONS. THEY ARE
23 FURTHER CONVERSIONS OF THAT INFORMATION, BUT HE DOESN'T
24 DISPUTE THAT IT IS MPEG ALL ALONG. MR. IANCU IS ACTUALLY
25 MAKING A DIFFERENT ARGUMENT THAN THE ONE THAT HIS TECHNICAL

1 EXPERT CAME UP WITH TO TRY TO JUSTIFY THEIR POSITION.

2 SO, BOTTOM LINE, IT IS UNDISPUTED WE FORMAT BEFORE WE
3 BROADCAST. IT IS ALREADY MPEG. IT IS NEVER CONVERTED TO
4 MPEG. IT IS CARRIED ON AN ANALOG CARRIER WAVE. IT IS
5 RECOVERED FROM THE CARRIER WAVE. THAT IS NOT THE CONVERSION
6 OF THIS PATENT.

7 NOW, LET'S TALK A LITTLE BIT ABOUT THE SEPARATE AND
8 ASSEMBLE POINT. WE CAN JUST SKIP THESE SLIDES. THERE WE GO.

9 SO CLAIM 1 HAS A SERIES OF ELEMENTS THAT ARE RELEVANT TO
10 THIS SEPARATION POINT. IT REQUIRES THAT THE MPEG STREAM OF
11 THE CLAIM, WHICH HAS BEEN PRODUCED BY THIS CONVERSION PROCESS,
12 IS SEPARATED INTO ITS VIDEO AND AUDIO COMPONENTS. IT REQUIRES
13 THAT THOSE COMPONENTS BE STORED ON A STORAGE DEVICE. THEN IT
14 REQUIRES THAT THIS OTHER CLAIM ELEMENT, THIS OUTPUT SECTION,
15 EXTRACTS THE VIDEO AND AUDIO COMPONENTS BACK OFF THE STORAGE
16 DEVICE AND ASSEMBLES THEM INTO AN MPEG STREAM.

17 WE PUT TOGETHER A GRAPHIC THAT IT SIMPLY ILLUSTRATES
18 THIS. YOU HAVE AN MPEG STREAM. IT IS INTERLEAVED,
19 INTERMINGLED VIDEO AND AUDIO. THEY ARE SEPARATED INTO THEIR
20 VIDEO AND AUDIO COMPONENTS. THEY ARE STORED. WHEN YOU WANT
21 TO PLAY IT BACK, THE BOX EXTRACTS IT FROM STORAGE, AND THEN
22 THE CLAIM REQUIRES ASSEMBLE SAID VIDEO AND AUDIO COMPONENTS
23 INTO AN MPEG STREAM.

24 NOW, WHAT ACTUALLY HAPPENS IN THE ECHOSTAR BOXES?
25 ACTUALLY, I'M SORRY, GO BACK. LET'S LOOK AT PICTURE 3, KARL.

1 MR. IANCU SAYS, WELL, THIS SEPARATION DOESN'T HAVE TO BE
2 ACTUAL SEPARATION. IT CAN BE ANALYSIS. IT CAN BE CREATION OF
3 AN INDEX THAT TELLS YOU WHERE WITHIN THE STREAM THESE VIDEO
4 AND AUDIO COMPONENTS ARE. WELL, THAT IS WRONG FOR TWO
5 REASONS.

6 FIRST OF ALL, IT IS WRONG UNDER THE PATENT BECAUSE THE
7 COURT DECLINED, DID NOT SAY HERE IS EXACTLY WHAT THE WORD
8 SEPARATE MEANS. IT DID SAY IT DOESN'T MEAN THE SAME THING AS
9 ANALYZE. THE PLAIN WORD SEPARATE DOES MEAN TAKE THESE TWO
10 THINGS THAT ARE TOGETHER AND PUT THEM APART. IT DOESN'T MEAN
11 GIVE GRADES THAT IF YOU LOOK THEM UP WILL TELL YOU WHO GOT
12 WHAT GRADE. IN MR. IANCU'S LAW SCHOOL EXAMPLE, SEPARATION
13 WOULD NOT BE GIVING PEOPLE GRADES THAT ARE ON A LIST
14 SOMEWHERE. IT WOULD BE OKAY, IN FIRST SEMESTER THESE PEOPLE
15 DID WELL, THESE PEOPLE DIDN'T DO WELL. SECOND SEMESTER, YOU
16 PEOPLE THAT DID WELL, YOU ARE IN THAT CLASSROOM OVER THERE.
17 YOU PEOPLE THAT DIDN'T DO SO WELL, YOU ARE UPSTAIRS IN A
18 DIFFERENT CLASSROOM.

19 THAT'S WHAT THE PLAIN MEANING OF THE WORD MEANS. AND THE
20 PATENT SHOWS US THAT THAT'S EXACTLY WHAT THE PATENT MEANS,
21 TOO. THAT WAS FIGURE 3 WE WERE LOOKING AT. AND WHAT WE HAVE
22 DONE JUST BECAUSE FIGURE 3 HAS ALL THESE LITTLE NUMBERS, THE
23 TEXT TELLS YOU WHAT THEY MEAN. THIS IS FIGURE 3 WITH THE WORDS
24 FILLED IN TO SHOW YOU WHAT THE TEXT SAYS THESE NUMBERS MEAN.
25 THE LINE IN THE MIDDLE, 301, IS THE INCOMING MPEG STREAM.

1 THIS ISN'T OUR CHARACTERIZATION. IT'S WHAT THE SPECIFICATION
2 ACTUALLY SAYS. IT IS INTERMINGLED VIDEO AND AUDIO.

3 THE LINE ABOVE 308 IS THE SEPARATE VIDEO STREAM, AND THE
4 LINE BELOW, 309, SEPARATE AUDIO STREAM. THOSE LITTLE LINES
5 THAT GO FROM THE A'S AND B'S IN THE MIDDLE STREAM TO THE TOP
6 AND BOTTOM ARE THERE IN THE ORIGINAL FIGURE AND THEY SHOW YOU
7 THAT WHAT IS ACTUALLY HAPPENING HERE IS STREAMS ARE BEING
8 CREATED ONCE VIDEO ONLY AND ONCE AUDIO ONLY. AND THE PATENT
9 GOES ON IN THE VERY NEXT FIGURE, FIGURE 4, AND IT SHOWS YOU
10 THAT WHAT HAPPENS TO THOSE STREAMS IS THEY ARE SEPARATELY
11 STORED. AGAIN, THIS IS JUST A PATENT FIGURE, AND THE LABELS
12 WE PUT ON IT ARE THE LABELS THAT THE SPECIFICATION PUTS ON THE
13 NUMBERS IN THE FIGURE, SO YOU DON'T HAVE TO LOOK THEM UP
14 SEPARATELY.

15 THAT THING AT THE TOP, 402, IS A VIDEO DMA ENGINE. A DMA
16 ENGINE IS A LITTLE PIECE OF HARDWARE THAT PUSHES DATA INTO A
17 BUFFER, VIDEO ONLY, AND 410 IS A VIDEO ONLY BUFFER. 403 DOWN
18 BELOW, LET'S STAY THERE FOR A SECOND, KARL. 403 DOWN BELOW,
19 AUDIO DMA ENGINE PUSHING AUDIO ONLY DATA INTO AN AUDIO ONLY
20 BUFFER. THIS IS ACTUAL SEPARATION. IT IS JUST WHAT THE WORD
21 SAYS.

22 NOW, IF WE GO ON, WHAT ACTUALLY HAPPENS TO THE ECHOSTAR
23 PRODUCTS? WE HAVE TWO FAMILIES OF PRODUCTS, ONE OF WHICH WE
24 CALL THE ECHOSTAR BROADCOM PRODUCTS, BECAUSE ALTHOUGH THERE
25 ARE DIFFERENCES AMONG THEM, ALL OF THEM USE A CHIP MADE BY

1 BROADCOM, AND IT HAS SOME OF THE KEY COMPONENTS WITHIN THE
2 CHIP. IN THESE PRODUCTS THE INCOMING MPEG STREAM, WHICH COMES
3 IN INTERLEAVED, IS NEVER SEPARATED INTO VIDEO AND AUDIO
4 COMPONENTS. THE PRODUCTS SIMPLY LOOK AT THE BIG TRANSPORT
5 STREAM WITH EIGHT OR NINE PROGRAMS WORTH OF VIDEO AND AUDIO
6 MIXED UP IN IT, PULL OUT THE AUDIO AND VIDEO TOGETHER FOR THE
7 PROGRAM THAT YOU WANT TO RECORD, AND PUT THAT STREAM STILL
8 INTERLEAVED, STILL IN THIS TRANSPORT INTERLEAVED FORMAT, ONTO
9 THE HARD DRIVE THROUGH A SERIES OF BUFFERS. NEVER SEPARATED.
10 NO SEPARATION, NO INFRINGEMENT.

11 NOW, WHAT ABOUT THE OTHER FAMILY OF PRODUCT, THESE ONES
12 WE CALL THE 50X PRODUCTS, BECAUSE THEY ALL HAVE A NUMBER THAT
13 STARTS WITH A 50 SOMETHING? THESE ARE A DIFFERENT CHIP. THEY
14 WERE INTERIM SERIES OF PRODUCTS THAT ECHOSTAR HAD FOR A WHILE,
15 DIFFERENT DESIGN, DIFFERENT CONFIGURATION. STILL COMING IN IN
16 A TRANSPORT STREAM WITH EIGHT OR NINE PROGRAMS ALL MIXED UP,
17 STILL HAVE THIS PIECE OF HARDWARE, THE PID FILTER, THAT PULLS
18 OUT THE AUDIO AND VIDEO FOR THE PROGRAM YOU WANT TO RECORD.
19 BUT IN THIS CASE, IT SEPARATES THE AUDIO AND VIDEO. AND THESE
20 PRODUCTS, THEY ARE REALLY SEPARATED. JUST LIKE THE PATENT
21 FIGURE SHOWS, VIDEO GOES INTO A VIDEO BUFFER AND THEN TO A
22 VIDEO FILE ON THE HARD DRIVE, AUDIO INTO AN AUDIO BUFFER AND
23 TO AUDIO FILE ON THE HARD DRIVE. STORED SEPARATELY ON THE
24 HARD DRIVE, BUT WHEN THEY ARE PULLED OFF, THEY ARE NEVER PUT
25 BACK TOGETHER.

1 SO IN THESE PRODUCTS THERE IS SEPARATION, BUT THERE IS NO
2 ASSEMBLY. THE PATENT REQUIRES ASSEMBLY AFTER STORAGE BACK
3 INTO AN MPEG STREAM. THERE ISN'T ANY. SO, THEY ALSO DO NOT
4 INFRINGE, BUT FOR A DIFFERENT REASON THAN THE FIRST FAMILY OF
5 PRODUCTS.

6 SO, I WANTED TO GRAPHICALLY SHOW THIS. THIS IS WHAT THE
7 PATENT REQUIRES, SEPARATION STORAGE ASSEMBLY. THIS NEXT
8 FIGURE IS A LITTLE COMPLICATED. THIS IS THE BROADCOM CHIP
9 PRODUCTS. WE HAVE A MULTI PROGRAM TRANSPORT STREAM COMING IN
10 FROM THE SATELLITE. WE PICK OUT FROM IT THE INFORMATION FOR
11 ONE PROGRAM, VIDEO AND AUDIO, INTERLEAVED, IN MPEG FORMAT.
12 GOES TO A BUFFER TOGETHER. GOES TO THE HARD DRIVE TOGETHER.
13 WANT TO PLAY IT BACK, YOU PULL IT OFF OF THE HARD DRIVE ON THE
14 RIGHT, BACK INTO A BUFFER. THE DECODER NOW IS PULLING THIS
15 INFORMATION TO PLAY IT BACK. STILL VIDEO AND AUDIO TOGETHER.
16 WE JUST SEND IT TO BOTH VIDEO AND AUDIO DECODERS. IT IS STILL
17 TOGETHER, SO WHAT WE DO IS WE SEND THIS STREAM TO BOTH
18 DECODERS, VIDEO AND AUDIO TOGETHER GOING TO BOTH DECODERS.

19 AT THE FRONT OF THE DECODER THERE IS A FILTER SO THE
20 VIDEO DECODER GETS ONLY VIDEO INFO. THE AUDIO DECODER GETS
21 ONLY AUDIO INFO. THERE WAS NEVER ANY SEPARATION. THIS THING
22 TRAVELED THROUGH THE WHOLE BOX ALL THE WAY TO THE DECODERS AS
23 INTERLEAVED AUDIO AND VIDEO.

24 NOW, MR. IANCU HAS TO CONFRONT THIS FACT. I'M SORRY,
25 THIS IS JUST THE ILLUSTRATION OF -- IF WE GO ON TO THE OTHER,

1 THE NEXT SLIDE, THIS IS JUST THE ILLUSTRATION OF THE BOXES
2 THAT DO SEPARATE, AND YOU SEE IN THIS ILLUSTRATION THERE IS
3 SEPARATION, THERE IS SEPARATE STORAGE, BUT THEY ARE NEVER PUT
4 BACK TOGETHER. NO INFRINGEMENT.

5 NOW, WHAT ABOUT THIS ARGUMENT THAT LOGICAL OR VIRTUAL
6 SEPARATION IS ENOUGH? WHAT DID MR. IANCU POINT TO AS THIS
7 LOGICAL OR VIRTUAL SEPARATION? HE POINTS TO THIS INDEXING
8 THAT SUPPOSEDLY OCCURS, WHICH HE SAYS DISTINGUISHES THE AUDIO
9 AND VIDEO, ALTHOUGH THEY ARE ALL MIXED UP TOGETHER IN ONE
10 STREAM FROM ONE ANOTHER. WELL, THERE IS TWO PROBLEMS WITH
11 THAT.

12 FIRST OF ALL, THIS ARGUMENT FLIES IN THE FACE OF THE
13 COURT'S CLAIM CONSTRUCTION; AND SECOND, IT'S FACTUALLY WRONG.
14 SO LET'S LOOK AT THE CLAIM CONSTRUCTION POINT FIRST, IF WE GO
15 ON TO THE NEXT SLIDE.

16 IN TIVO'S SUMMARY JUDGMENT MOTION, BASICALLY WHAT THEY
17 ARE ASKING THE COURT TO DO IS SAY THAT THIS INDEXING PROCESS,
18 THIS START CODE DETECT PROCESS SATISFIES BOTH THE PARSE
19 REQUIREMENT, WHICH THE COURT CONSTRUED AS ANALYZED, AND THE
20 SEPARATE REQUIREMENT, WHICH MR. IANCU WOULD ALSO LIKE THE
21 COURT TO SAY ACTUALLY MEANS ANALYZE, ALTHOUGH HE CALLS IT
22 DISTINGUISH TO TRY TO MAKE IT SOUND LIKE A DIFFERENT WORD.
23 BUT, HE IS POINTING TO THE SAME INDEXING TO SATISFY BOTH.

24 IN CLAIM CONSTRUCTION, THE COURT AGREED THAT PARSE MEANT
25 ANALYZE, BUT THE COURT SAID SEPARATE DOES NOT MEAN THE SAME

1 THING AS PARSE. SO THIS ARGUMENT JUST DOESN'T WORK AS A
2 MATTER OF CLAIM CONSTRUCTION, WHICH HAS BEEN DETERMINED IN
3 THIS CASE, AND WHICH TIVO HASN'T ASKED TO HAVE RECONSIDERED AS
4 A MATTER OF JUST CLAIM PRINCIPLES WHERE TWO WORDS DON'T MEAN
5 THE SAME THING. IT CAN'T WORK.

6 NOW, IT ALSO HAPPENS TO BE FACTUALLY WRONG. WHAT
7 ACTUALLY HAPPENS IN THE START CODE DETECT PROCESS IN THESE
8 ECHOSTAR BROADCOM BOXES, AS IS SHOWN BY THE EVIDENCE THAT WAS
9 SUBMITTED WITH ECHOSTAR'S BRIEF, THE AUDIO FRAMES ARE NEVER
10 INDEXED. WHAT HAPPENS IS THIS STREAM IS COMING ALONG. AND,
11 KARL, CAN WE JUST GO BACK TO ONE OF THE SLIDES THAT SHOWS THE
12 STREAM?

13 SO, IF YOU LOOK ON THE LEFT WHERE THE PID FILTER IS, YOU
14 SEE THERE IS STREAM WITH VVAVA. THE START CODE DETECT, WHICH
15 IS IN THE CHIP RIGHT AFTER THE PID FILTER, AND I THINK IN THE
16 BINDER THAT TIVO HAS GIVEN YOU, THERE IS A PICTURE OF THIS
17 PART OF THE CHIP. THE START CODE DETECT COMES RIGHT AFTER
18 THAT PID FILTER. AND IT LOOKS AT THE STREAM AS IT GOES ALONG,
19 AND AS MR. IANCU SAID, IT IS LOOKING SAYING: WHERE IS THERE AN
20 IMPORTANT EVENT? WELL, IN THIS CHIP IN THIS BOX THE IMPORTANT
21 EVENT IS WHERE DO I SEE THE START OF A VIDEO FRAME? THE START
22 CODE DETECT MAKES AN INDEX OF THE LOCATION OF THE START OF
23 EVERY VIDEO FRAME. IT IGNORES THE AUDIO. IT IS IN THERE. IT
24 IS ALL MIXED UP WITH VIDEO. IT IS IGNORED BY THIS INDEX.
25 THERE IS NO DISTINGUISHING IN THIS INDEX BETWEEN AUDIO AND

1 VIDEO. THERE IS JUST A RECORD OF THE LOCATION OF THE START OF
2 EVERY VIDEO FRAME, AND THAT'S IT. SO FACTUALLY, THIS ARGUMENT
3 DOES NOT WORK AS WELL. NOW --

4 THE COURT: AND THESE SAME ARGUMENTS BECOME THE BASIS
5 OF YOUR MOTION FOR NONINFRINGEMENT?

6 MS. KREVANS: TECHNICALLY, OUR MOTION IS A REQUEST
7 FOR SUMMARY JUDGMENT ON THEIR MOTION. BUT, YES, THAT'S RIGHT.
8 I TAKE IT FROM WHAT YOUR HONOR SAID AT THE BEGINNING, YOU
9 WOULD LIKE TO HEAR THEIR REPLY ON THIS BEFORE WE ADDRESS THE
10 SOFTWARE ISSUES OF OUR MOTION?

11 THE COURT: YES.

12 MS. KREVANS: OKAY. I WILL SIT DOWN, THEN.

13 THE COURT: REPLY.

14 MS. KREVANS: YOUR HONOR, WHILE THEY ARE SWITCHING
15 COMPUTERS, I SHOULD HAVE SAID --

16 THE COURT: NOTEBOOKS.

17 MS. KREVANS: WE HAVE BINDERS AS WELL. I WAS GOING
18 TO HAND THOSE OUT SO EVERYONE HAS COPIES. THEY ALSO HAVE IN
19 THEM THE SLIDES FOR THE LATER PRESENTATION.

20 MR. IANCU: LET ME TAKE, YOUR HONOR, MS. KREVANS'
21 STATEMENTS IN ORDER. FIRST, ON THE CONVERSION POINT, THE
22 BOTTOM LINE IS THAT WHEN THE DATA TRAVELS FROM THE SATELLITE
23 TO EARTH IT IS NOT AN MPEG FORMATTED STREAM. TO BE AN MPEG
24 STREAM PURSUANT TO THE MPEG STANDARD, IT MUST BE DIGITAL.
25 THIS IS AGREED UPON BY THE PARTIES, AND IT IS IN THE MPEG

1 SPECIFICATION.

2 THE COURT: WHAT FORMAT, YET ONE MORE TIME, ARE YOU
3 SAYING IT IS TRANSMITTED IN FROM THE SATELLITE?

4 MR. IANCU: IT IS AN ANALOG FORMAT. AND TO BE AN
5 MPEG FORMATTED STREAM, AS THE CLAIM REQUIRES, IT MUST BE
6 NECESSARILY CONVERTED FROM ANALOG TO DIGITAL. THERE ARE
7 ADDITIONAL CONVERSIONS, THOUGH. THE CLAIM REQUIRES NOT JUST
8 CONVERSION TO MPEG, IT REQUIRES CONVERSION TO MPEG STREAM FOR
9 INTERNAL TRANSFER AND MANIPULATION. AND TO THAT END, THERE
10 ARE PLENTY OF CONVERSIONS PERFORMED UPON THE DATA BY THE
11 ECHOSTAR SYSTEM.

12 WE CAN SEE ANALOG TO DIGITAL CONVERSION, DEMODULATION,
13 FORWARD ERROR CORRECTION, SCRAMBLING AND DESCRAMBLING. THESE
14 ARE ALL CONVERSIONS SO THAT THE DATA CAN BE IN A STANDARD
15 FORMAT, AS THE CLAIM REQUIRES, FOR INTERNAL TRANSFER AND
16 MANIPULATION. JUST THE FACT THAT THE INFORMATION WAS
17 ORIGINALLY IN MPEG IS IRRELEVANT. WHAT IS RELEVANT IS THAT IT
18 HAS GOT TO BE CONVERTED TO AN MPEG FORMATTED STREAM, WHICH
19 MEANS DIGITAL, FOR INTERNAL TRANSFER AND MANIPULATION.

20 DR. GIBSON, OUR EXPERT, NEVER AGREED, AS ECHOSTAR
21 ALLEGES, THAT THE DATA IS NOT AN MPEG FORMATTED STREAM.

22 NOW, ON TO THE SEPARATION AND ASSEMBLY POINT. ANALYSIS
23 AND SEPARATION ARE DIFFERENT EVEN IN THE LOGICAL WORLD. WHEN
24 YOU LOOK AT THE DATA AND YOU ANALYZE IT, YOU INSPECT IT, YOU
25 ARE DETERMINING WHAT IS VIDEO AND WHAT IS AUDIO, THAT IS THE

1 ANALYSIS. THE RESULT OF THAT ANALYSIS IS THAT YOU CREATE A
2 FRAME INDEX IN THE ECHOSTAR SYSTEM, ALSO IN THE TIVO PATENT,
3 AN INDEX THAT CATEGORIZES THE VIDEO FRAMES, WHERE THEY ARE,
4 WHEN THEY CAME IN, AND WHERE IN MEMORY THEY ARE LOCATED. THAT
5 IS THE SEPARATION. ECHOSTAR ADMITS, AS MS. KREVANS JUST SAID,
6 THAT THE AUDIO FRAMES ARE NEVER INDEXED. THEY ARE SO
7 SEPARATED FROM THE VIDEO FRAMES THAT THEY ARE NOT EVEN IN THE
8 INDEX. THE INDEX IS PURELY REFERENCING THE VIDEO FRAMES. IT
9 IS A VIDEO FRAME INDEX.

10 NOW, MS. KREVANS AND ECHOSTAR DISCUSSED THE ASSEMBLY, AND
11 THEY ARE ARGUING THAT SOME OF THEIR PRODUCTS DO NOT ASSEMBLE.
12 LET'S TAKE A QUICK LOOK AT WHAT THE PATENT MEANS BY ASSEMBLY,
13 AND THIS IS SLIDE 43 IN THE COURT'S BINDER.

14 THERE IS THE INDEX TABLE THAT HAS BEEN CREATED ON THE
15 INPUT SIDE. NOW WHEN WE WANT TO ASSEMBLE THE DATA SO WE CAN
16 WATCH IT, THE INDEX TABLE IS ACCESSED, WHICH HAS VIDEO FRAME
17 INFORMATION, AND A STREAM IS ASSEMBLED. ON OUTPUT, THE LAST
18 STEP WE SEE ON SLIDE 44, HERE TOWARDS THE END, AFTER THE DATA
19 HAS BEEN STORED, THEN IT IS EXTRACTED. TWO STREAMS ARE
20 CREATED, A VIDEO STREAM AND AN AUDIO STREAM. EACH ONE IS
21 ASSEMBLED. EACH STREAM IS ASSEMBLED FROM THE HARD DRIVE AND
22 EACH ONE IS PURSUANT TO THE MPEG STANDARD, A PES STREAM AS IT
23 IS CALLED IN THE STANDARD. THERE IS NO DISPUTE THAT STREAMS
24 ARE ASSEMBLED ON OUTPUT, AND ALL OF THEIR PRODUCTS ASSEMBLE
25 SUCH STREAMS. AND WITH THAT I WILL --

1 THE COURT: THESE SEEM LIKE RATHER CLASSIC ISSUES OF
2 FACT FOR A JURY TO WORK THROUGH. IT WOULD SEEM GENERALLY IT
3 IS AN UNWISE CHOICE ON THE COURT'S PART TO GRANT A SUMMARY
4 JUDGMENT TO THE PLAINTIFF ON INFRINGEMENT. WHY IS MY
5 ASSESSMENT NOT CORRECT? OBVIOUSLY, YOU HAVE SPENT THIRTY
6 MINUTES TELLING ME WHY, BUT HOW WOULD YOU SUMMARIZE THAT
7 QUICKLY?

8 MR. IANCU: WELL, IT VERY WELL MAY BE THAT ALTHOUGH
9 THERE ARE PLENTY OF AGREEMENTS AS TO HOW THE PRODUCTS OPERATE,
10 THE PARTIES MAY BE PERHAPS SPINNING THE FACTS IN DIFFERENT
11 WAYS.

12 THE COURT: THAT IS USUALLY MY EXPERIENCE, ESPECIALLY
13 IN THIS CASE.

14 MR. IANCU: ALL RIGHT. THANK YOU, YOUR HONOR.

15 THE COURT: NOW WHAT, WHAT WOULD YOU LIKE TO TAKE UP
16 AT THIS TIME ON BEHALF OF ECHOSTAR?

17 MS. KREVANS: YOUR HONOR, ECHOSTAR HAS --

18 THE COURT: WOULD YOU LIKE TO COMMENT ON THE COURT'S
19 LAST QUESTION, WHY ARE THESE NOT SIMPLY CLASSIC ISSUES OF FACT
20 FOR A JURY TO DETERMINE?

21 MS. KREVANS: I THINK, YOUR HONOR, ALTHOUGH YOU WILL
22 CONSIDER THIS SPIN NO DOUBT, THAT THAT IS TRUE WITH RESPECT TO
23 THE MOTION --

24 THE COURT: THE PLAINTIFF'S MOTION, BUT NOT YOUR
25 MOTION?

1 MS. KREVANS: WELL, AND THERE IS REASON FOR THAT,
2 BECAUSE TO WIN THEY HAVE TO PROVE THAT WE INFRINGE EVERY
3 ELEMENT OF THE CLAIM, AND THERE ACTUALLY ARE SOME SIGNIFICANT
4 FACTUAL DISPUTES ON SOME OF THE ELEMENTS. WE JUST HAVE TO
5 SHOW THAT WE DON'T INFRINGE AT LEAST ONE. I DON'T THINK THERE
6 IS ANY FACTUAL DISPUTE, CERTAINLY WITH RESPECT TO THE
7 CONVERSION ISSUE, AND WE THINK WE ARE ENTITLED TO SUMMARY
8 JUDGMENT ON THAT.

9 THE REMAINING MOTIONS, THERE IS ECHOSTAR'S MOTION FOR
10 NONINFRINGEMENT ON THE SOFTWARE CLAIMS. TIVO BROUGHT A CROSS
11 MOTION ON THAT, WHICH, AS WE SAID IN OUR PAPERS, WE THINK WAS
12 IMPROPER. WE ALSO, IF THE COURT CONSIDERS IT, DO REQUEST
13 JUDGMENT ON THEIR MOTION AS WELL. THERE ARE TWO OTHER MOTIONS
14 THAT ARE CLAIMS DIRECTED, AND WHAT I WOULD LIKE TO DO IS JUST
15 TAKE ALL OF THOSE TOGETHER. AND THEN WHEN WE FINISH ALL OF
16 THOSE, AND BECAUSE THERE IS AN INVALIDITY MOTION AND A
17 DOCTRINE OF EQUIVALENTS MOTION, THERE ARE TWO MOTIONS THAT ARE
18 NOTHING TO DO WITH THE CLAIMS RELATING TO MARKING AND
19 WILLFULNESS.

20 THE COURT: THERE IS A DAMAGE, DAMAGE ISSUE.

21 MS. KREVANS: RIGHT. RIGHT. AND MR. KRAMER WILL
22 ARGUE THOSE, SO I WANT TO TAKE THE REST OF THE CLAIM DIRECTED
23 MOTIONS TOGETHER, AND IF WE COULD FINISH THOSE, THEN I THINK
24 WE COULD TURN TO THE SEPARATE TOPICS OF WILLFULNESS AND
25 DAMAGES.

1 I WANT TO JUST TALK ABOUT A COUPLE OF ISSUES ON THESE
2 SOFTWARE CLAIMS, AND THE TWO ISSUES I AM GOING TO TALK ABOUT
3 ARE THE OBJECT ISSUE AND AN ISSUE ABOUT THE PHYSICAL DATA
4 SOURCE AND WHETHER THEIR SOFTWARE THAT EXTRACTS DATA FROM IT.

5 LET ME START WITH THE OBJECT ISSUE, AND I WANT TO START
6 WITH CLAIM CONSTRUCTION. CAN YOU GO BACK A COUPLE THERE,
7 KARL? THANK YOU.

8 TIVO ASKED THE COURT TO CONSTRUE OBJECT TO MEAN A
9 COLLECTION OF DATA OR OPERATIONS, I.E., PORTIONS OF A COMPUTER
10 PROGRAM, BASICALLY, ANYTHING IN THE CODE. THE COURT DIDN'T DO
11 THAT. THE COURT SAID OBJECT MEANS A COLLECTION OF DATA AND
12 OPERATIONS. SO WHAT DID, WHAT DOES THAT MEAN? WELL, IN OUR
13 VIEW, THAT MEANS THERE ARE NO OBJECTS IN OUR CODE, NONE THAT
14 HAVE ANYTHING TO DO WITH THE FUNCTIONS OF THE OBJECTS OF THE
15 CLAIMS. NONE OF THE CUE SOFTWARE WAS WRITTEN AND ORGANIZED BY
16 THE PROGRAMERS AS A COLLECTION OF DATA IN OPERATIONS THAT
17 PERFORMS THE REQUIRED FUNCTIONS.

18 NOW, THE COURT WILL RECALL THAT THE CONSTRUCTION OF EACH
19 OF THESE FOUR OBJECTS, THE SOURCE, THE TRANSFORM, THE SINK,
20 AND THE CONTROL OBJECT, IN ESSENCE, WAS A COLLECTION OF DATA
21 AND OPERATIONS THAT PERFORMED A LIST OF FUNCTIONS, AND THEN
22 THE COURT PUT THE LIST IN. AND THE LIST WERE THINGS THAT WERE
23 TAKEN FROM WHAT THE CLAIMS SAID EACH OF THE OBJECTS HAD TO DO.
24 THERE IS NOT, WHEN YOU LOOK AT THE ECHOSTAR CODE, ANY
25 COLLECTION OF DATA AND OPERATIONS THAT PERFORMS THE LIST OF

1 FUNCTIONS THAT EACH OBJECT HAS TO DO. SO I AM GOING TO TALK
2 ABOUT THAT ISSUE, AND THEN I AM GOING TO TALK ABOUT THIS OTHER
3 EXTRACTION ISSUE.

4 BUT LET'S START WITH OBJECTS. THIS IS JUST TO REMIND US
5 THE BASIC ORGANIZATION OF THE SOFTWARE THAT IS CLAIMED IN THE
6 PATENT, SOURCES, TRANSFORM, SINKS. THE CONTROL OBJECT IS NOT
7 SHOWN IN THIS FIGURE. IT IS IN ANOTHER ONE RIGHT ABOVE THE
8 TRANSFORM. AND YOU SEE THE TRANSFORM IS SITTING THERE BETWEEN
9 THE SOURCE AND THE SINK, AND IT IS THE THING THAT CONTROLS
10 DATA GOING ON AND OFF THE HARD DRIVE AS WELL. IF WE COULD GO
11 TO THE NEXT SLIDE.

12 WHAT DID TIVO DO TO TRY TO COME UP WITH AN INFRINGEMENT
13 POSITION HERE GIVEN THAT ECHOSTAR PROGRAMERS DID NOT ACTUALLY
14 CODE USING OBJECTS? WELL, HERE IS WHAT THEY DID. THEIR
15 EXPERT, DR. GIBSON, WITH SOME ASSISTANCE FROM TIVO'S COUNSEL,
16 WENT THROUGH THE ECHOSTAR CODE WITH THE COURT'S OBJECT
17 CONSTRUCTION. ACTUALLY, THE FIRST TIME HE DID IT, WE DIDN'T
18 HAVE THE CONSTRUCTION YET, BUT THE SECOND TIME HE HAD IT. HE
19 SAID OKAY, I WILL START WITH THE SOURCE.

20 THE SOURCE HAS TO DO FOUR THINGS. IT HAS GOT FOUR
21 FUNCTIONS IT HAS GOT TO PERFORM. HE LOOKS THROUGH ALL OF THE
22 ECHOSTAR CODE, AND ANYWHERE, ANYWHERE IN THE WHOLE CODE BASE
23 THAT HE FOUND SOME CODE THAT DID ANY PART OF ANY OF THE THINGS
24 ON THAT LIST OF FOUR FUNCTIONS, HE SAID OKAY, I AM GOING TO
25 PUT THIS CODE FILE OR THIS ROUTINE ON MY SOURCE LIST, AND HE

1 MADE A LIST.

2 NOW, IT IS UNDISPUTED THAT THE ECHOSTAR PROGRAMERS DID
3 NOT ACTUALLY COLLECT ALL OF THOSE FUNCTIONS THAT ARE ON DR.
4 GIBSON'S LIST TOGETHER. THEY ARE NOT COLLECTED TOGETHER, AND
5 THE DATA THAT THEY OPERATE ON IS NOT COLLECTED TOGETHER WITH
6 THEM. THE COLLECTION THAT TIVO OFFERS TO SATISFY THE COURT'S
7 CONSTRUCTION IS NOT A COLLECTION IN THE ECHOSTAR CODE. IT IS
8 A COLLECTION THAT WAS MADE BY DR. GIBSON.

9 NOW, LET'S TALK ABOUT HOW WE KNOW THAT TO BE TRUE. WELL,
10 FIRST OF ALL, WE KNOW IT TO BE TRUE BECAUSE YOU WILL NOTICE IN
11 TIVO'S RESPONSE TO OUR MOTION, IN ANY OF THE BRIEFING THAT
12 THEY PUT IN, THEY NEVER POINTED TO ANY INSTANCE WHERE THEY
13 SAID HERE IS A FACTUAL SHOWING THAT THE DATA AND OPERATIONS TO
14 HAVE TO DO ALL THE THINGS THE SOURCE OBJECT CAN DO, FOR
15 EXAMPLE, ARE COLLECTED TOGETHER. THEY JUST DIDN'T MAKE THAT
16 SHOWING. THAT'S BECAUSE IT'S NOT TRUE.

17 AND HERE IS SOMETHING EVEN BETTER. TIVO'S EXPERT ADMITS
18 THAT HE DIDN'T DO AN ANALYSIS OF THAT KIND AT ALL. SO, HE
19 CAN'T OFFER TESTIMONY THERE IS SUCH A COLLECTION, BECAUSE HE
20 DIDN'T LOOK TO SEE.

21 THIS IS FROM HIS DEPOSITION AND WE SEE WHAT HE SAYS. THE
22 QUESTION: AND THEN MAYBE WITH SOME HELP FROM MR. GIZA, YOU
23 LOOKED AT THE CODE AND FOUND WHEREVER IT OCCURRED IN THE CODE,
24 IN WHATEVER FILE, THE DIFFERENT PORTIONS OF THE CODE THAT
25 PERFORMED THE SOURCE OBJECT FUNCTIONS, RIGHT? DR. GIBSON

1 SAID: I LOOKED IN THE CODE AND FOUND AS MUCH AS I COULD,
2 RIGHT. AND THEN YOU MADE A LIST WHERE YOU FOUND THESE THINGS.
3 THAT'S YOUR SOURCE OBJECT COLLECTION, RIGHT? SOMETHING LIKE
4 THAT. A LIST WAS ACCUMULATED. AND THEN I WENT BACK OVER IT
5 AGAIN. RIGHT. SO, HE MADE THE LIST AND HE CHECKED IT. OKAY.
6 AND IN YOUR ANALYSIS OF THE CODE, IT WAS IRRELEVANT HOW THE
7 PROGRAMERS CHOSE TO STRUCTURE THE CODE AND WHETHER THEY
8 THEMSELVES GROUPED THEIR REQUIRED FUNCTIONS TOGETHER, RIGHT?
9 ANSWER: I DON'T KNOW IF IT IS IRRELEVANT NOW, SO WHETHER OR
10 NOT I LOOKED FOR THE FUNCTIONS AND I DIDN'T SEARCH FOR
11 GROUPINGS.

12 HE JUST LOOKED TO WHEREVER HE COULD FIND ALL THE THINGS
13 ON THE LIST OF FUNCTIONS, NO MATTER WHERE HE FOUND THEM, MADE
14 A LIST. HE DIDN'T LOOK TO SEE IF THEY WERE COLLECTED
15 TOGETHER. THAT GROUPINGS IS WHAT HE IS CALLING COLLECTIONS.

16 AND, THEN THERE IS A LITTLE MORE TESTIMONY THAT IS ALSO
17 QUITE PERTINENT HERE. WE WERE STILL TALKING ABOUT THE SOURCE
18 OBJECT IN HIS DEPOSITION, BUT THE ANSWER ABOUT ALL THE OBJECTS
19 IS HE DID THEM ALL THE SAME. WHEN YOU WENT LOOKING IN THE
20 CODE FOR THE SOURCE OBJECT, YOU DID NOT TRY TO PERFORM AN
21 ANALYSIS AS TO WHETHER THE PROGRAMERS IN WRITING THE CODE HAD
22 STRUCTURED THE CODE SO THAT THE CODE THAT PERFORMS THESE FOUR
23 FUNCTIONS WAS GATHERED TOGETHER ANY LOGICAL WAY? ANSWER: I
24 THINK IT MIGHT BE A LITTLE DIFFERENT. I DIDN'T SEE THAT IT
25 WAS GATHERED TOGETHER IN THAT WAY. RIGHT THERE HE IS